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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1141

OTTO C. BERRY AND GENERAL MOTORS CORPORATION,

Petitioners,

vs.

BOHN ALUMINUM & BRASS CORPORATION AND ADOLPH L. NELSON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. BRUNINGA,
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ALEXANDER F. BAILLIO,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Otto C. Berry and General Motors Corporation, respectfully pray for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit, to review the judgment of that Court entered on January 13, 1942; Petition for Rehearing denied March 5, 1942.

Summary and Short Statement.

This cause involves a suit for infringement of a United States Patent, No. 1,877,490, for an improvement in Pistons, particularly aluminum pistons for internal combustion or gas engines.[1] The District Court (Judge Tuttle) held the patent valid and infringed as to the claims in issue; but the Court of Appeals, while finding infringement of the patent, if valid, held the patent invalid as to the claims in issue and reversed the decree of the District Court. In so deciding, the Court of Appeals readjudicated, without new evidence, issues of patentability decided by the Patent Office in bitterly contested interferences involving the very claims in issue, and in which petitioners were opposed by respondents and another who were then parties to a piston patent-pooling agreement involving the very piston here involved.

The Inventor is the Real Party in Interest.

Petitioner, Berry, is the inventor of the piston of the patent and is still the owner thereof, while General Motors Corporation (hereafter called General Motors) is licensed under the patent by instruments entitled "License" (R. 2364) and "Additional Supplemental Agreement" (R. 2380),[2] the latter constituting an amendment to the former. While the Court of Appeals (R. 2882) has designated Berry as the "owner of the legal title", and General Motors as "the exclusive licensee", the legal effects of the agreements

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[1] Patents for aluminum pistons for gas engines were before this Court on successive petitions for Writs of Certiorari to the Circuit Court of Appeals for the Sixth Circuit, in *Schriber-Schroth Co. et al.* v. *The Cleveland Trust Co. et al.*, in which the decisions are reported at 305 U. S. 47 and 311 U. S. 211.

[2] There are a series of agreements (R. 2364-2388) but the above really determine the nature and scope of the license rights granted.

are such that the inventor remained not only the owner of the patent but retained effective control thereof.

In addition to providing for the payment of royalties, based on the number of pistons, accountings therefor, and also minimum royalties, the inventor retained "the entire control" of the interferences in which the application was then involved, although General Motors did "assume at its own expense and through its Patent Section, the further expense of said interferences", and later of an interference in the Canadian Patent Office. Suits for infringement could only be instituted by General Motors when there was "substantial infringement", with one half of the recoveries to Berry; but the inventor could intervene, and even himself sue, and in such event retain all recoveries. Any "royalty-free cross licensing agreement" to other automobile companies was precluded.

But the most important control retained by the inventor was that General Motors agreed to grant sublicenses to others at the inventor's request and "on reasonable royalties and conditions"; and the inventor's right to proceed against General Motors was recognized for "violation or non-performance". Two such licenses to piston manufacturers were granted (R. 2814, 2821), at royalty rates as low as 1½ cents per piston, and these were specifically approved by Berry (R. 2819, 2826).

Hence this is not the usual case where an inventor has parted with his beneficial interest in the patent. On the contrary, the inventor is the real party in interest here. It is the inventor who stands to lose by the decision of the Court below as his licensee is not required to pay royalties after the patent is held invalid (R. 2367) and the sublicensees have already surrendered their licenses.

Respondents and Another Co-party to a Patent Pool Unsuccessfully Contested Berry's Rights in Prior Proceedings.

Respondent, Bohn Aluminum and Brass Corp. (hereinafter called Bohn Corp.) is a piston manufacturer, one of the parties to a patent pooling arrangement [3] referred to by this Court in the Pistons Cases, 305 U. S. 49. One aspect of the pooling arrangement was to dominate the market, limit production and fix prices on the "so-called control led type" piston which as defined (R. 4745) is the piston of the Berry patent.

Respondent Nelson is a prolific patentee in the piston art. His patents are assigned to Bohn Corporation. Two such Nelson patent applications were involved in interference proceedings with the application for the Berry patent here in suit. The interferences involved the very claims here in suit, namely, 5, 15, 18 and 35. Claim 5 was in Berry's application as filed—claim 35 was taken from Nelson's application. An application of one Jardine (pooled by the Aluminum Company of America with The Cleveland Trust Company) was also involved in that interference.

Although the Primary Examiner had found those claims allowable, both Nelson and Jardine filed Motions to Dissolve on the ground of unpatentability for the same alleged reason and on the same prior art now assigned by the court below as rendering the Berry patent invalid. The interferences were thereupon referred to an independent "Law Examiner", highly qualified and experienced in mechanics and patent law, who rendered his decisions on March 10,

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[3] This pooling arrangement involved a Declaration of Trust (R. 2680), and a series of cross license agreements, (R. 2664, R. 2732, R. 2745) which are summarized in Appendix I hereof.

1927 (R. 2224, 2268), holding the claims in issue patentable (R. 2231, 42, 45; R. 2271, 3, 5).[4]

Nelson admitted (R. 708) that about Decoration Day 1923, Jardine had told Nelson of somebody having shown Jardine a sketch "similar to the design shown in Nelson's Exhibit No. 86" (R. 711), which is at Record page 2151, and which is an illustration of one of the figures in one of the Nelson applications in the interference. Berry testified in the Interferences (Ex. 399 at page 328) of such disclosure to Jardine the day after Decoration Day and that it was of "my piston". Berry further testified (R. 1422-3) that he tried to sell his "idea" to Aluminum Company in 1923 and to Bohn Corporation in 1926, but as to the latter "they just kidded me along and never made an offer of any kind". Den Uhl of Bohn Corporation admitted (R. 1605-6) that Bohn Corporation knew of the Berry application in 1926 when the interferences were declared, and that Berry came to see Mr. Markey of that company. On April 9, 1927, Berry made the license agreement with General Motors (R. 2364), which agreed to assume the anticipated tremendous expense of the interferences.

On October 12, 1927, there were executed the triple series of licenses, as noted above, involving Bohn Corporation, Cleveland Trust and Aluminum Company.

On January 24, 1928, there was another decision (R. 2282) by the Law Examiner, which shows another attempt by Jardine (Cleveland Trust) to have a claim, which is claim 35 of the patent, held unpatentable over the Ricardo and Napier patents and the Nelson published article; but this was again refused.

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[4] Claims 5 and 18 of the Berry patent were numbered counts 1 and 7 of one interference (R. 2268-9); and claims 15 and 35 of the Berry patent were counts 1 and 39 of another interference (R. 2224, 2227). The Knight and Hartog patents cited by the Court of Appeals, and not discussed by the Examiner, were classed with the Napier patent by Judge Tuttle (R. 2090); they are simply cumulative.

Thereafter the decisions on priority by the Examiner of Interference, on January 29, 1930, were favorable to Berry. Both Nelson and Jardine appealed to the Board of Appeals, but that Tribunal on August 21, 1930, affirmed the Examiner of Interferences.

On September 11, 1930, Cleveland Trust (Jardine) sued Berry in the District Court at Detroit under R. S. 4915 to challenge the judgment of the Patent Office. On September 30, 1930, Nelson (Bohn Corp.) proceeded under R. S. 4911 to challenge the same judgment of the Patent Office in the Court of Customs and Patent Appeals. The latter court affirmed the Patent Office on June 20, 1932, 59 F. (2) 351.

While Berry prevailed on the Commissioner to grant his patent on September 13, 1932, the 4915 suit constituted a "cloud on the title" of Berry until decided in his favor by the District Court on August 4, 1934, and affirmed by the Court of Appeals October 12, 1938.

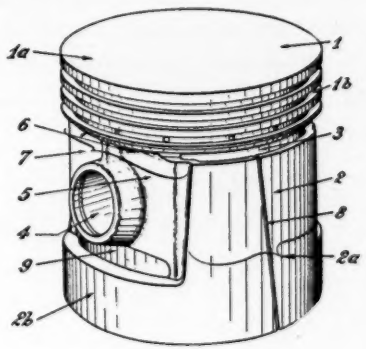
Throughout this series of proceedings, patentability of the claims here in suit was repeatedly attacked by Respondents and Cleveland Trust. Such attack was made before the Law Examiner (R. 2224, 2268 and 2282); the Examiner of Interferences, (R. 2263); the Board of Appeals, (R. 2265); the District Court in the 4915 suit, (R. 2292); and finally in the Court of Appeals for the Sixth Circuit, which held that claims 15 and 35 (both here in suit) "describe an invention common to both Berry and Jardine". (99 F. (2) 517, 522).

The efforts of Respondents and of Cleveland Trust, in the interferences, to not only prevent the issue of a patent to Berry, but to secure its issue to one of them, while they and Aluminum Company were protected by a three-fold tie, (See Appendix I), show the value that was placed on the Berry piston, by the then dominated aluminum piston industry, not only as a solution of the piston problem, but as

a competitor to the flexible pistons of Cleveland Trust and the law expansion aluminum-silicon piston alloys of Aluminum Company, the litigation of which was noted by the Court of Appeals (R. 2885).

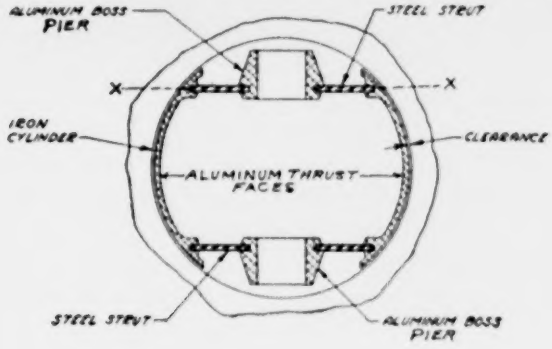
The Berry Patent Piston.

The Berry piston was the result of many efforts to overcome the problem faced by the environment of an aluminum piston in a gas engine, because of the high coefficient of expansion of an aluminum piston compared to that of an iron cylinder. This environment was briefly stated by this Court in the Piston Case, 305 U. S. 49, 51. This court then discussed the various ways suggested and practiced from 1912 to 1922 to compensate for that expansion, including separation of the head from the skirt, vertical splitting of the piston skirt, and making the webs of aluminum flexible. The Court of Appeals also discussed this, 92 F. (2) 330, and here (R. 2885). Low expansion aluminum silicon alloy pistons are discussed in Aluminum Company v. Thompson Products, 122 F. (2) 796. For convenience and comparison, a cut of the accused piston in the Piston Case is inserted here.



However, as will be readily seen, making the aluminum webs flexible made them subject to metal fatigue and breakage, particularly in high speed engines, while that is not true of steel struts (R. 75).

Berry, who was a professor of automotive engineering at Purdue University, solved the problem, but in such a manner, as he stated in the first sentence of his patent, that his "internal combustion engine piston" retained "all the advantages of non-ferrous pistons", but was "free from the disadvantages" thereof. This Berry did in a very simple way. Instead of relying on the flexure of the aluminum webs to compensate for the excess expansion, Berry provided a pair of steel webs cast-embedded at their ends in the ends of the thrust faces, and also cast-embedded at their middles in the piers carrying the bosses. With such a structure, these webs now suppressed the expansion, chordally, in accordance with the low coefficient of expansion of the steel employed in contrast with the high coefficient of expansion of aluminum. This is illustrated by the cut below, which is a cross section of a Berry piston. However, the spacing and anchoring of the struts was such as to produce a strong piston which could be readily cast and later machined to secure any desired thrust face; in other words, it retained "all the advantages of" aluminum pistons as then produced, which was then ground either round or



cam ground oval. This was not only a solution, but indeed an ideal solution, as is evidenced by the fact that Respondents have made and sold over thirty-five million pistons embodying the principle of the Berry patent. How many such pistons were produced by the licensees under the triple agreements we do not know, but the penalties imposed on excess production (twenty cents per piston) and on price deviation (thirty-five cents per piston) are noted in Appendix I.

There was no such piston in the art prior to Berry. Of the prior art cited by the Court of Appeals, the Ricardo piston was an all aluminum piston, which the Court of Appeals found did not solve the problem, even to the extent of the flexible web piston; *Cleveland Trust* v. *Schriber-Schroth*, 92 F. (2) 330. The Knight, Napier and Hartog pistons employed iron rings at or near the bottom, and not at the top where, as Judge Tuttle found (R. 2090), "it is most necessary to control expansion"; the latter was also found by the Court of Appeals in the previous case (92 F. (2) 334). The old Nelson pistons employed a single strut placed at the center, or as duplicate struts close together at the center, which, as found by Judge Tuttle (R. 2090), were "in the wrong place for proper functioning and the piston was difficult to cast". The Law Examiner discussed all this prior art in his decisions (R. 2224, 2268 and 2282), except the Knight and Hartog patents, which are merely cumulative to the Napier patent and classed together by Judge Tuttle (R. 2090).

The Proceedings in the District Court.

The trial was in open court before Judge Tuttle, who has tried many patent cases, who is highly skilled in mechanics, and has a thorough understanding of the principles of patent law. The trial lasted twenty-six days, with frequent examination of witnesses by the court, as well as wit-

nessing of demonstrations. Petitioners' witnesses were Stellmann, whose experience (R. 28 etc.) with automobile and airplane pistons extended from 1909 to date, first, as mechanic, later, chief engineer of Franklin, and now as senior engineer at the Naval Aircraft Engine Factory; Professor Lay, (R. 983 etc.) senior member of the staff, teaching automotive engineering at the University of Michigan; and Townhill (R. 1432 etc.), an engineer highly qualified on the molding and finishing of aluminum pistons. Respondents relied mainly on Ray, a professional patent "expert" (R. 365 etc.), for Nelson testified on the question of priority, which was abandoned at the hearing (R. 2081), and on his single and disc strut pistons.

Excerpts from the oral argument are included in the record at pages 2080-2084; the Opinion of Judge Tuttle at pages 2100-2119; his Findings of Fact and Conclusions of Law at pages 2085-2099; and the Interlocutory Decree at pages 2120-2121. The Berry patent was sustained as to claims 5, 15, 18 and 35 and held infringed by each of the three pistons, Exs. 302, 303 and 304, the first two of which were ground round, while the third was cam-ground oval.

The Decision of the Court of Appeals.

While the Court of Appeals recognized that (R. 2883) Respondents had made thirty-five million pistons[5] which would infringe the Berry patent if valid, no effect in strengthening the presumption raised by the grant was given to this copying by respondents, nor to the large commercial use of the copy, nor to the fact that there was a pressing problem facing the piston art (R. 2883).

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[5] In the language of the Court of Appeals these pistons differed from the Berry patent by "a distinction without a difference", "an immaterial difference", "the accused struts perform the equivalent function of the struts of Berry". (R. 2884).

While the Court of Appeals (R. 2883) mentioned the "interference proceedings between Nelson, Berry and Jardine", and that "priority" was adjudged to Berry, the court said that "these holdings • • • are not controlling when the validity of the claims is involved in an infringement case", citing this Court's decision in the *Piston* case, 305 U. S. 47, 59.

Claim 35 was held invalid (R. 2885), because it does not specify "that the chordal struts which connect the skirt segments shall have a coefficient of expansion less than that of aluminum". In doing so the Court of Appeals did not read or interpret the claim of the patent in the light of its specification, which states specifically that the struts have a lower coefficient of expansion than aluminum; this was recognized by the Court of Appeals (R. 2884).

In considering the proceedings in the District Court, the Court of Appeals assumed (R. 2886-8) that the District Court had found and concluded that cam grinding the skirt of the Berry piston oval was "an essential element" of the patented structure, and that the District Court had "read into the claims in issue as an essential element" such cam grinding. That this could not be so is apparent from the Court of Appeals reference (R. 2888) to the "Packard narrow-strut piston, which is not ground oval", and which had been referred to (R. 2883), as one of the accused pistons, and as to which the Court of Appeals stated (R. 2885) "We conclude that the District Court correctly found that the accused pistons infringe if the Berry patent is valid".

The Court of Appeals then (R. 2888-91) considered the Berry patent structure and, after discussing the prior art, concluded (R. 2890) "the only substantial distinction between Berry and Ricardo lies in the substitution of metals which was old". The question of substitution of metals

had, however, been passed upon, favorable to Berry, by the Patent Office Tribunals in the interference proceedings; and there was no new evidence before the Court of Appeals, for although the Knight and Hartog patents were not mentioned by the Examiner, they are simply cumulative to the Napier patent before the Examiner, and they were so classed together in the District Court's finding (R. 2090).

Reasons Relied Upon for the Allowance of the Writ.

Petitioners believe that the Writ of Certiorari should be granted in these cases for the following reasons:

I.

The Circuit Court of Appeals for the Sixth Circuit has held unpatentable, over prior art, claims of a patent owned by the inventor Berry, the application for which patent was involved in bitterly contested interference proceedings with applications of respondents and another party. Respondents and the other party not only contested patentability of those very claims throughout those interference proceedings, over substantially the same prior art and with substantially the same evidence, but after failing, contested priority before the Tribunals of the Patent Office, the Court of Customs & Patent Appeals, the District Court of the United States and the Circuit Court of Appeals. Meanwhile respondents and the other party to the interference proceeded with, and were operating under, piston patent-pooling agreements dominating the aluminum piston industry, including the applications of respondents and such other party and covering this very piston; and meanwhile respondents proceeded with the manufacture and sale of this very piston and sold them in tens of millions.

The decision of the Court of Appeals raises the important question whether an inter partes determination of

patentability, contested in an interference proceeding, is impressed with any finality as between the same parties and upon the same claims, in the absence of any newly discovered non-cumulative evidence, or whether the question remains open for future litigation between the same parties.

The question involves the application of this Court's decision in *Radio Corp.* v. *Radio Lab.*, 293 U. S. 1, 2 and 8, where a question of patentability of claims over prior art was involved; and whether such decision is limited by this Court's decision in *Schriber-Schroth* v. *Cleveland Trust*, 305 U. S. 47, 59, which involved a question of sufficiency of description in the specifications, and was not between the same parties as in the interference.

II.

The Circuit Court of Appeals misconceived the findings and conclusions of the District Court, by erroneously assuming that the District Court found and concluded that cam grinding oval the skirt of the Berry patent piston was an essential feature of the patented structure, and that the District Court read into the claims of the patent such feature as an essential element; whereas, the District Court in fact found the patented structure as one which advantageously permitted cam grinding as practiced in the making of pistons before Berry, and whereas the District Court found and concluded infringement of the claims by two accused pistons in which the skirts were ground round and not oval.

The decision of the Court of Appeals raises the important question whether the decision of this Court in *Schriber-Schroth* v. *Cleveland Trust*, 305 U. S. 47, denies to an inventor of a patented structure the potencies, capacities, advantages, uses and practices of the prior art, which the patented structure is capable of and adapted for, and

whether the decisions of this Court in *Radio Corp.* v. *Radio Lab.*, 293 U. S. 1, 11, 12 and 14; *Webster Loom Company* v. *Higgins*, 105 U. S. 580, 586, approved in *Honolulu Corp.* v. *Halliburton*, 306 U. S. 550, 559; are limited by the decision of this Court in *Schriber-Schroth* v. *Cleveland Trust*, supra.

III.

The Court of Appeals held claim 35 of the Berry patent invalid, because it does not "specify that the chordal struts which connects the skirt segments shall have a coefficient of expansion less than that of aluminum", although the specifications do so specifically state, and although there was no file wrapper history restriction in this respect.

This is clearly contrary to this Court's decision in *Schriber-Schroth* v. *Cleveland Trust*, 311 U. S. 211, 217, that "the claims of a patent are always to be read or interpreted in the light of its specifications", if there is no file wrapper history in this respect.

IV.

The Court of Appeals held the claims in issue of the Berry patent invalid, as involving simply a substitution of materials, although the claims are for new combinations of which steel struts are elements, but combined in a new way with the remaining elements of a piston, namely; the aluminum thrust faces and the aluminum piers extending down from the aluminum head to form an integral structure. The Court of Appeals refused to give effect to the decisions of the Tribunals of the Patent Office in the interferences where this question was litigated on substantially the same evidence by Berry and respondents. The Court of Appeals refused to give effect to the factors of long felt want; of a problem in this art solved by the inventor Berry; copying by and the great commercial success of the patented piston by respondents; of the great enrich-

ment by respondents and its colleague (another party to the interference) in piston patent pool which sought to and did dominate the market in the Berry piston; and of the bitter contest by respondents and then colleague, seeking to obtain the patent for Berry's invention. The Court of Appeals also refused to accept the findings of the District Court on the novelty of the patented piston, on the failure of the prior art to solve the problem, of unobviousness, and that it involved more than mechanical skill.

The question here involves the application of this Court's decision in *Smith* v. *Goodyear Dental Vulcanite Company*, 193 U. S. 486, 496, that a combination is patentable even if there is substitution of material of one of its elements, where such substitution involves a new mode of construction, or develops new uses and properties of the article formed; particularly where there was a problem solved by the patentee and commercial success (193 U. S. 495).

The decision of this Court has been lately followed by Courts in other Circuits; *United Shoe Machinery Co.* v. *Ferree*, 64 F. (2) 101, 103, C. C. A. 2; *Tyra* v. *Adler*, 85 F. (2) 548, 552, C. C. A. 8, and *Gasoline Products Co.* v. *Coe*, 87 F. (2) 550, 557, App. D. C. All of these cases involved combination claims and are in apparent conflict with the decision of the Court of Appeals in this case. This Court has not reviewed this question since *Magowan* v. *New York Belting Co.*, 141 U. S. 332. Its importance is demonstrated by the facts that in the *United-Ferree* case, supra, this Court granted certiorari, 290 U. S. 614; but the case was dismissed per stipulation of counsel, 290 U. S. 708.

Prayer.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued to the Circuit Court of Appeals for the Sixth Circuit, to the end that this cause may

be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Sixth Circuit be reversed; and that petitioners be granted such other and further relief as may be proper.

OTTO C. BERRY and
GENERAL MOTORS CORPORATION,
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April 13, 1942.